IP 01-1468-C K/T Simpson v Flagstar Bank
Judge John D. Tinder Signed on 08/11/03

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SIMPSON, SARA,	)	
INDIVIDUALLY AND ON BEHALF OF	)	
ALL OTHERS SIMILARLY SITUATED,	)	
	)	
Plaintiffs,	)	
vs.	)	
	)	
FLAGSTAR BANK,	)	
FLAGSTAR BANK FSB,	)	CAUSE NO. IP01-1468-C-T/K
FLAGSTAR BANCORP INC,	)	
	)	
Defendants.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SARA SIMPSON and ANNE KAVELMAN, individually and on behalf of others similarly situated	)	
	)	IP-01-1468-C-K/T
Plaintiffs,	)	
	)	
vs.	)	
	)	
FLAGSTAR BANK, FLAGSTAR BANK, FSB and FLAGSTAR BANKCORP., INC.,	)	
	)	
Defendants.	)	

ENTRY REVIEWING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION[1]

This class action lawsuit arises from Flagstar Bank FSB's[2] loan policy capping the loan officer revenue per loan (RPL) which can be earned by a loan officer at a lower

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[1]This Entry is a matter of public record and is being made available to the public on the court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

[2]It appears that Flagstar Bankcorp, Inc., is Flagstar Bank FSB's parent corporation, and that the other named Defendant, Flagstar Bank, does not exist as a separate entity. The Defendants thus contend that, as sole lender, Flagstar Bank FSB alone is the proper defendant in this action. The Plaintiffs did not object to this assertion in any of the proceedings below, and the magistrate judge recommended dismissal of all counts as to these two Defendants. In the Plaintiffs' Response to Defendants' Objections to Magistrate's Report and Recommendation, they maintain their silence on this issue. The court therefore adopts the magistrate's recommendation in this regard, and **GRANTS** the Defendants' summary judgment motion as to Flagstar Bankcorp, Inc. and Flagstar Bank.

percentage for minorities than non-minorities. The magistrate judge issued a Report and Recommendation. The Defendants have objected to the magistrate's recommendations regarding certification of the Simpson subclass and summary judgment as to Simpson. The court has considered the Report and Recommendation as well as the Defendants' objections, and now rules as follows.

I. Magistrate's Report and Recommendation

On May 1, 2001,[3] Flagstar Bank FSB ("Flagstar") instituted a mortgage loan policy (Loan Officer Policy 01-07) (the "Policy") whereby it capped loan officer RPL at 3% for

[3]The magistrate described the class as including non-minority borrowers who closed mortgages with the Defendants from May 1, 2001 to January 31, 2002. The Defendants object that the Policy did not apply to loans "in process" on May 1, but only to loans *originating after* May 1. (Robinson Aff. ¶ 8.) The Defendants also assert that the magistrate incorrectly overlooked a change in the Policy effective October 1, 2001, whereby the Policy would not apply to mortgage loans under $50,000. (Olis Aff. ¶ 3.) The Plaintiffs do not appear to have contested either of these claims in the proceedings before the magistrate, and the court accordingly will adopt the appropriate modifications in the class scope.

minority borrowers and 4% for non-minority borrowers.[4] The Policy was discontinued on January 31, 2002.

On September 25, 2001, Plaintiff Sara Simpson, a non-minority, closed a loan with Flagstar where the loan officer earned 3.23% loan officer RPL, more than the 3% cap for minority borrowers. On August 6, 2001, Plaintiff Anne Kavelman, a non-minority, closed a loan where the loan officer earned 1.5% loan officer RPL.

The Plaintiffs sued under Section 3605 of the Fair Housing Act ("FHA"), codified at 42 U.S.C. § 3605, as well as 42 U.S.C. § 1981 and 42 U.S.C. § 1982. They sough to certify two subclasses: one, with Simpson as class representative, consisting of non-minority borrowers who were charged over the 3% cap for minorities; and the second, with Kavelman as class representative, who closed loans within the Policy period but were not charged over 3%.

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[4]According to William M. Robinson III, the Senior Vice President of Retail Production at Flagstar, loan officer RPL is the name for the commission received by loan officers when they close a loan. It is based on three items: the origination fee (charged to the borrower), the discount fee (also charged to the borrower), and the yield spread premium (a payment by Flagstar to the loan officer in exchange for securing a certain interest rate (Miller Dep. at 61)). The sum of these three items, expressed as a percentage of the total loan, is referred to as loan officer RPL. (Robinson Aff. ¶¶ 4-5.) The court notes that, on this description, it is technically incorrect to say that a borrower is "charged" a loan officer RPL, since one of the items that enters the calculation is not charged to borrowers, but paid by the bank to the loan officer. Nonetheless, both parties use this term (*see, e.g.*, Defs.' Objections to Class Certification at 5), and as loan officer RPL is largely constituted by the actual fee incurred by a borrower, the court will interchangeably refer to loan officer RPL as an amount charged to the borrower as well as earned by the loan officer.

The magistrate judge recommended that the motion to certify the Kavelman subclass be denied because those charged a fee under the cap for minorities were not "aggrieved persons" as that term is understood in the FHA and, therefore, they lacked standing to sue. Looking ahead to the substance of the claim, the magistrate found that it would economize on judicial resources first to enter summary judgment against Kavelman and then deny class certification. The court thereby avoids the complex issue of class certification with respect to a claim which is doomed to fail. *See Smith v. Short Term Loans*, 2001 WL 127303, at *4 (N.D. Ill. Feb. 14, 2001). The court finds this treatment appropriate. While the Defendants lose the benefit of the preclusive effect achieved by class certification followed by entry of judgment, *see Smith*, 2001 WL 127303, at *4, they have not objected. Although the Plaintiffs coyly request the court to adopt the magistrate's Report and Recommendations with regard to "Plaintiff Sara Simpson" only (Pl.'s Resp. to Defs.' Objections), neither do they raise an explicit objection to the magistrate's recommendations regarding the grant of summary judgment and denial of certification of the Kavelman subclass. Accordingly, the motion for summary judgment as to Kavelman will be **GRANTED** in favor of the Defendants and certification of the Kavelman subclass will be **DENIED**.

With respect to the Simpson subclass, the magistrate found that the proposed class met the Rule 23 requirements of numerosity, commonality, typicality, and adequacy of representation. As the Plaintiffs elected to proceed under Rule 23(b)(3), the magistrate further determined that common questions of fact or law predominate over questions affecting only individual members, and that a class action would be superior to other methods for the fair and efficient adjudication of the controversy. The magistrate recommended certification of the Simpson subclass, and grant of summary judgment in favor of Simpson. The Defendants maintain that both these aspects of the magistrate's report are in error. This Entry reviews *de novo* those portions of the report and recommendation to which objection has been made. 28 U.S.C. § 636(b).

II. Class Certification

The Defendants argue that delay and irregularities in implementing the Policy raise questions of fact as to liability and damages regarding individual class members which overwhelm any questions common to the class. Although the Defendants do not expressly designate which part of the Rule 23 requirement is not met, the court understands the objection to target the typicality, commonality, and predominance components of the rule.

The magistrate's recitation of the relevant legal standards is an accurate statement of the law and will not be repeated here. The magistrate judge concluded that the typicality, commonality and predominance requirements of Rule 23 were met because Flagstar engaged in standardized conduct, via its discriminatory loan policy, towards all members of the Simpson subclass. *See, e.g., Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998) (commonality requirement of Rule 23(a) satisfied by standardized conduct towards members of the proposed class). The Defendants do not deny the existence of the Policy, but claim, instead, that it was not uniformly applied to every mortgage processed by Flagstar, because of both delays in dissemination (Robinson Aff. ¶ 8) and occasional disregard by loan officers (*id.*). Specifically, the Defendants cite a report that during the Policy term, out of a total of 1,196 loans where the loan officer RPL exceeded 3%, 251 were to minority borrowers, in violation of the Policy. The Defendants argue that this evidence reveals the need for a case by case determination of liability and damages because, for each member of the Simpson subclass, it would have to be individually determined what role the Policy played in his or her loan transaction. The need for such individualized determinations in turn defeats the commonality, typicality, and predominance prerequisites to class certification.

The Defendants arrive at this result by framing the issue the wrong way. In order to ascertain whether the Policy affected a non-minority borrower, it is sufficient to ask whether the loan officer who processed her loan earned a loan officer RPL in excess of 3%. If so, the answer is yes: but-for the borrower's race, the loan officer would have received a lower commission for closing on the loan (and the borrower charged a correspondingly lower amount). That is a clear violation of the anti-discrimination laws–the FHA, § 1981, and § 1982–invoked by the Plaintiffs. As the Simpson subclass is already confined to those who paid in excess of the 3% cap for minorities, the legal and factual issues are virtually identical for all members of the class. To be sure, evidence of the sort relied on by the Defendants having to do with the consistency of implementation of the Policy would be relevant to establishing or refuting the *existence* of such a policy. For instance, if the Defendants could show that the Policy were uniformly ignored by Flagstar's loan officers, then it could assert the defense that the Policy existed on paper only. But proof of occasional non-compliance or delay, as the Defendants have offered here, does not make out that defense. As such, it does not undermine the presumption that were a borrower in the Simpson subclass of a different race, she would have been charged less (at most 3%). It would be remarkable, after all, if an organization could escape liability for the adoption of an openly discriminatory policy because of its uneven application towards the group it was meant to favor. Solely because some minority borrowers did not gain the benefit of Flagstar's loan officer RPL cap on account of poor implementation of the Policy does not erase the harm to those majority borrowers who were charged an amount in excess of the minority cap.

The Defendants have not pointed to any authority for their "Keystone Cops" theory of defense, nor has the court been able to discover any. The Defendants instead cite a series of cases dealing with attacks on yield spread premiums paid by banks to mortgage brokers. *See Lacasse v. Washington Mut.*, 198 F. Supp. 2d 1255 (W.D. Wash. 2002); *Aiello v. Providian Fin. Corp*., 231 B.R. 693 (N.D. Ill. 1999); *Hinton v. First Am. Mortgage*, No 96C5668, 1998 WL 111668, at *5 (N.D. Ill. Mar. 4, 1998). In each of these cases, it was alleged that yield spread premiums received by mortgage brokers were, in effect, kickbacks in violation of the Real Estate Settlement Procedures Act. In each case, the court denied class certification because the test for whether the amount paid by the banks was an illegal referral fee depended on whether it was reasonably related to the services provided by the broker, which in turn demanded scrutiny of each individual transaction to discover what services were rendered. Those courts thus reasoned that individual issues swallowed those common to the class as a whole. *See., e.g., Hinton*, 1998 WL 111668, at *5. In this case, by contrast, a determination of liability and actual damages can be reached without any recourse to elaborate fact-finding, and so the yield spread premium cases do not suggest a similar result here.

The Defendants raise a second objection to class certification, one which was not brought to the magistrate's attention but does not demand prolonged analysis. They assert that the Plaintiffs' request for emotional damages requires an individualized assessment, destroying commonality, typicality, and predominance. It is true that a request for class-wide emotional damages may defeat class certification by creating fact-specific damages questions which overwhelm the common issues. *See, e.g., Doe v. Chao*, 306 F.3d 170, 183 (4th Cir. 2002), *cert. granted*, –U.S.- - - -, 123 S. Ct. 2640 (U.S. Jan. 27, 2003) (noting that magistrate judge recommended denial of class certification on the ground that "emotional damages are likely to be so variable and fact-specific that damages issues overwhelm liability.") (denying class certification on other grounds); *see also Sanna v. Delta Airlines*, 132 F.R.D. 47, 50 (N.D. Ohio 1990); *Morales v. Digital Equipment Corp.*, 669 F. Supp. 1173, 1185-86 (D.P.R. 1987), *aff'd*, 843 F.2d 613 (1st Cir. 1988); 5 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 17:12 (4th Ed. 2002). On the other hand, it cannot be said that emotional damages always defy class treatment. *See Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 65 (S.D. Ohio 1991) (certifying class where emotional injuries were claimed because such claims may be typical if they stem from a common event).

The most recent version of the Plaintiffs' proposed class notice requests class members who have experienced emotional distress as a result of Flagstar's Policy to contact class counsel with information. (Pls.' Withdrawal of Prior Mots. Regarding Class Notice and Mot. for Approval of Proposed Class Notice.) In response to an earlier proposed class notice, the Defendants announced their intention to "request an order determining that Plaintiffs' claims for emotional distress may not be tried on a class-wide basis, because Plaintiff Simpson cannot possibly provide evidence from which a trier of fact may determine the emotional distress allegedly suffered by a thousand other borrowers across the country [.]" (Defs.' Resp. in Opp'n to Pls.' Mot. for Approval of Proposed Am. Class Notice.) So, the emotional damages issue is still pending before the court. The court has grave doubts about an approach whereby testimony from Simpson alone would provide sufficient basis from which to extrapolate a figure representing an emotional damages award for the entire class, but it appears by soliciting information from individual class members regarding possible emotional injuries the Plaintiffs have abandoned this approach. In any event, emotional damages are just one component of the Plaintiffs' overall claims; and the need for individualized adjudication of these claims, if any, would not undermine the predominance of the common issues of fact and law nor the superiority of a class action over other methods for the fair and efficient adjudication of this controversy. *See* Fed. R. Civ. P. 23(b)(3). "[T]he mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible." *Sterling v. Velsicol Chemical Co.*, 855 F.2d 1188, 1197 (6th Cir. 1988). In view of these common issues, it would be extraordinarily wasteful to oblige each member of the Simpson subclass to bring suit separately in order to obtain a judgment. Indeed, in light of the small amount any one litigant would recover, it would be unlikely that very many suits would be brought. *See Amchem Products v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.") (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). Therefore, the magistrate's recommendation to certify the Simpson subclass was correct and the motion to certify will be **GRANTED**.

III. Summary Judgment in Favor of Simpson

The Defendants also object to the magistrate judge's recommendation to enter summary judgment on behalf of Simpson. In their brief on this subject, they reiterate many of the same arguments made earlier in response to the motion for class certification. Whereas there they contended that a determination as to liability and damages hinged on the need for individualized fact-finding as to the role of the Policy in any single loan transaction, here they assert that the outcome of such an inquiry in the case of Simpson depends on disputed issues of material fact. As will be made clear, that argument meets with a similar fate in this context as it did in that one.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue at to any material fact[.]" Fed. R. Civ. P. 56(c). The magistrate's comprehensive exposition of the summary judgment standard eliminates the need for any further explication by this court.

The court begins by clearing up some misapprehensions held by the parties regarding the statutes at issue. As the magistrate noted, 42 U.S.C. § 1981 and 42 U.S.C. § 1982, prohibiting discrimination in the making of contracts and the sale of real-estate, respectively, both "derive their operative language from the first section of the Civil Rights Act of 1866'' and "[b]ecause of their common origin and purpose, § 1981 and § 1982 are generally construed in tandem." *Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir. 1996) (citations omitted). Both require proof of intentional discrimination. *Id.* at 414.[5] The FHA, although generally analyzed in the same fashion as the reconstruction statutes, *see Maki v. Laakko*, 88 F.3d 361, 364 (6th Cir. 1996), also permits a disparate impact claim

[5]The court pauses to note that both statutes, as well as the FHA, encompass what is commonly referred to as "reverse discrimination," *i.e.*, discrimination on the basis of race against a white person. *See McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1976) (applying § 1981 to prohibit discrimination against whites); *Jordan v. Khan*, 969 F. Supp. 29 (N.D. Ill. 1997) (acknowledging that while primary purpose of FHA to remedy discrimination against minorities, statutory language not so restricted; allowing plaintiff to state claim for reverse discrimination). The Defendant does not argue to the contrary.

and, for such a claim, does not demand a showing of intentional discrimination. *See Gomez v. Chody*, 867 F.2d 395, 402 (7th Cir. 1989) ("a discriminatory effect, without any discriminatory intent, *may* constitute a violation of the FHA.") In this case, however, the Plaintiffs bring a classic disparate treatment claim: they assert they were treated differently (charged a higher loan officer RPL) because of their race. Such a claim, even when brought under the FHA, hangs on evidence of intentional discrimination. The Plaintiffs to the contrary, "disparate treatment" and "intentional discrimination" are simply two different phrases for the same concept. *See, e.g., Eiland v. Trinity Hosp.*, 150 F.3d 747, 751 (7th Cir. 1998) ("When racial discrimination is based on a claim of disparate treatment, proof of intentional discrimination is required.") (internal quotation and citations omitted).

The Plaintiffs have adduced ample evidence of intentional discrimination in the form of the Policy, which explicitly accords different treatment to persons depending on their race. Despite this evidence, the Defendants submit that summary judgment should not be entered because (1) even in the absence of the Policy, Simpson might have been charged the same loan officer RPL (3.23%) and, therefore, a question of fact exists as to whether she was affected by the Policy; (2) the Defendants have produced evidence that the Policy was widely disregarded, which again purportedly creates a question of fact as to the relation between the Policy and the injuries complained of; and (3) Simpson did not identify any comparably situated minorities who were charged a lower loan officer RPL.

The first two arguments have been addressed in the context of class certification and can be disposed of without detailed discussion. It may be true that Simpson would have been charged the same loan officer RPL even in the absence of the Policy, although it would seem that for total commission revenues to remain steady under the Policy, majority borrowers would have to be charged marginally more to make up for the loss in revenues caused by those instances where the cap prevented an increased fee to a minority. It may also be true that Simpson was charged a commercially reasonable fee. Both objections misapprehend the nature of the protection afforded by the anti-discrimination statutes, which have nothing to do with the commercial reasonableness of transactions and focus entirely on the presence of intentional discrimination. Thus, under the FHA and reconstruction statutes, a defendant may not utilize race as a basis on which to confer a benefit on one group while denying that same advantage to a second group–even if the second group is harmed only in the sense of being denied a privilege not otherwise generally available (such as a cap on commission fees). That is why the proper inquiry in this case, as stated above, is whether, but-for Simpson's race, she would have been charged a lower loan officer RPL. The evidence of the Policy alone suffices to answer that question. There is, therefore, no genuine issue of material fact which could be submitted to a jury. The Defendants' argument as to the irregular implementation of the Policy has been adequately dealt with in the preceding section on class certification. As discussed there, such evidence would be irrelevant to any issue in the case, and so this argument too fails to ward off summary judgment.

Finally, the Defendants correctly note that Simpson has not identified a similarly situated minority who was charged a lower loan officer RPL, but that is not fatal to her claim. Identification of a similarly situated person of a different race who was afforded favorable treatment is an essential element of a prima facie case under the *McDonnell Douglas* burden-shifting framework for employment discrimination, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), however, the Seventh Circuit has expressed reservations about extending that framework to credit discrimination cases. *See Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 714 (7th Cir. 1998) ("wholesale transposition of the *McDonnell Douglas* standard to the credit discrimination context would display insensitivity to the thinking behind the standard."). Instead, "[i]t is always open to a plaintiff in a discrimination case to try to show in a conventional way, without relying on any special doctrines of burden-shifting, that there is enough evidence, direct or circumstantial, of discrimination to create a triable issue." *Id*. That is what the Plaintiffs have done here. In light of the direct evidence of intentional discrimination in the form of the Policy, there was no need for the Plaintiffs to have hunted for individual minorities comparably situated to Simpson who were charged lower rates. Any such proof would have been superfluous. The court therefore **GRANTS** the motion for summary judgment in favor of Simpson.

IV. Conclusion

In keeping with the foregoing, the court will **DENY** certification of the Kavelman subclass; will **GRANT** summary judgment against Kavelman in favor of the Defendant Flagstar Bank FSB; and will **GRANT** certification of the Simpson subclass, specified as follows:

> non-minority borrowers nationwide who were subject to Loan Officer Policy 01-07 when they initiated mortgage loans in any amount from May 2, 2001 to October 1, 2001 or in an amount equal to or in excess of $50,000 from October 1, 2001 to January 31, 2002, and were charged over 3% loan officer revenue per loan.

The court will also **GRANT** summary judgment against the Defendant Flagstar Bank FSB in favor of Simpson; and will **GRANT** summary judgment in favor of Defendants Flagstar Bankcorp, Inc. and Flagstar Bank on all claims.

Due to the pendency of damages issues and the close relationship among all claims, and thus the desirability of avoiding a multiplicity of appeals, the court will delay entry of judgment until the disposition of all remaining issues.

ALL OF WHICH IS ENTERED this 11th day of September 2003.

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John Daniel Tinder, Judge
United States District Court

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